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Supreme Court of the United States

October Term, 1945

No. 220

DAISY I. MORGAN, Executrix of the Estate of CELESTE SMITH MURRAY, Deceased, *Petitioner*

vs.

FRANK T. HINES, as Administrator of Veterans Affairs, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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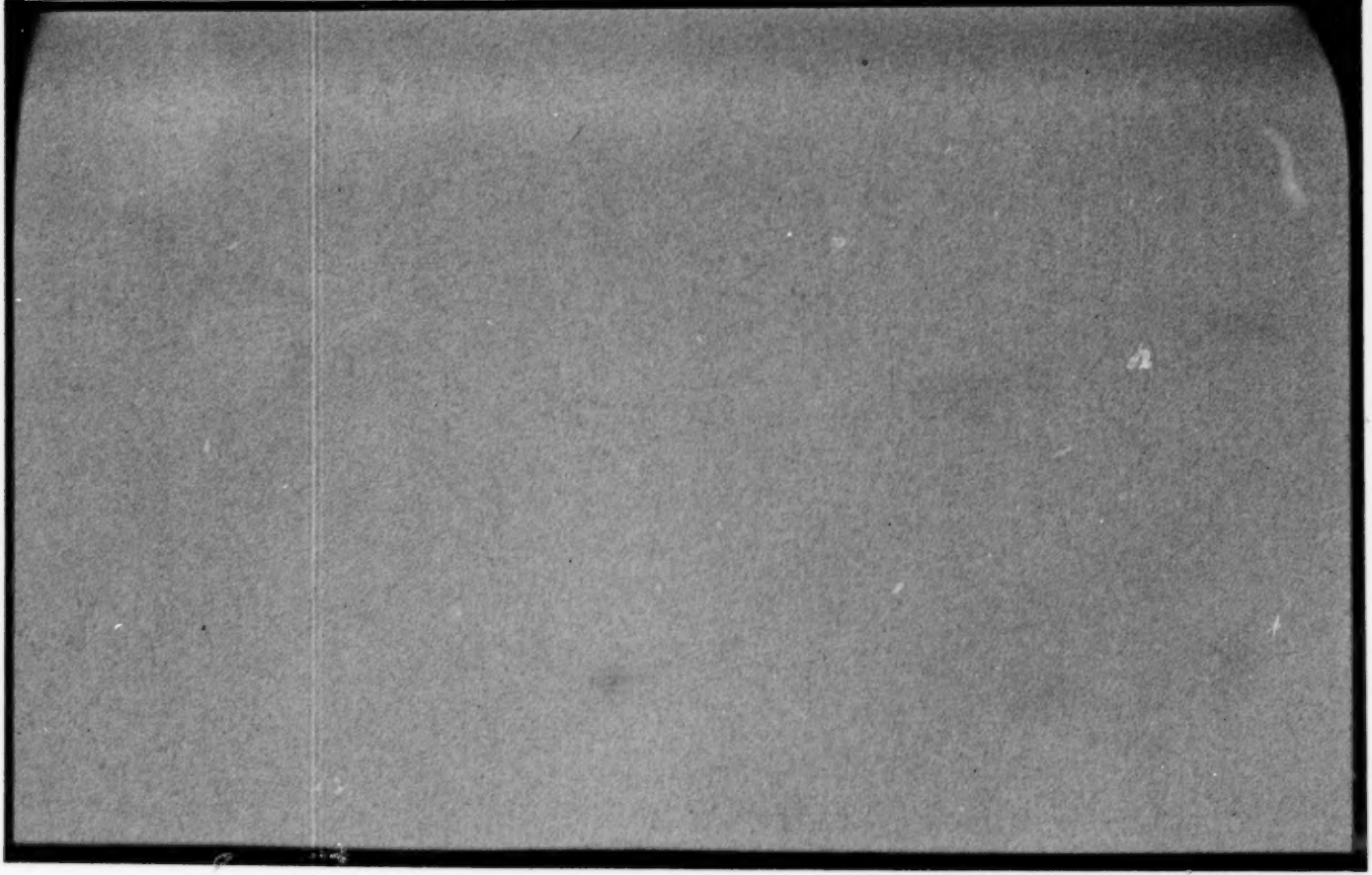

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, and the appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on April 16th, 1945 (R. 21).

Opinions Below.

The Justice of the District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia is set forth at pages 18 and 19 of the record.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on April 16, 1945 (R. 21). Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

The case involves two important questions of law. There are a large number of government insurance policies now in force under the World War Veterans Act, and the National Service Life Insurance Acts both of which Acts are being administered by the respondent. The first question is whether under the admitted allegations of the petitioner's Complaint was the petitioner entitled to a reinstatement of the government insurance policy issued by the respondent. The second question which is of more than ordinary importance, is whether the respondent, acting as Administrator of Veterans Affairs, may without regard to the facts in every application for reinstatement of insurance, act arbitrarily, capriciously and contrary to the evidence. The petitioner contends that under the undisputed facts, the terms of the policy, and the regulations, the policy of insurance should have been reinstated. Reinstatement was denied based on a finding that the insured was not in good health, and that there was not a scintilla of evidence before the respondent to support such a finding.

Statement of Facts.

This is a suit in the nature of a mandamus to compel the respondent, as Administrator of Veterans Affairs, to perform his ministerial duties. The suit was originally brought by Celeste Smith Murray, but pending trial she died and Daisy I. Morgan, the executrix of her will, substituted as party plaintiff.

Because of the great importance of the questions involved in this action and which turn to a great extent upon the allegations of the Complaint the facts alleged in the Complaint will be stated in detail. The judgment in the case was predicated upon the motion to dismiss the action because sufficient facts were not stated to constitute a cause of action (R. 16).

The Complaint alleges (R. 1) that the defendant (respondent) was and now is the duly appointed, acting and qualified Administrator of Veterans Affairs, and is charged by law with the administration of the World War Veterans Act, 1924, as amended, and is particularly charged with the duty of issuing insurance policies under the World War Veterans Act, the receipt of premiums on said policies, and the administrative duty of reinstating policies. The Complaint further alleges (R. 2) that one Powhattan Powers Murray while in the military service of the United States on December 12, 1927, had duly issued to him a $10,000.00 government life policy being K 852,467, and that it was provided in the said policy that in the event of death of the said insured while the said policy was in force the United States would pay to his designated beneficiary Celeste Powers Murray the sum of $10,000.00.

The Complaint further alleges (R. 2) that premiums became due and payable on the said policy on the 12th day of each month; that the premium rate for the first sixty months was $6.70 per month. The Complaint further alleges that at the end of the five years period the policy was renewed as of December 12, 1932, at a premium rate of $7.00 per month.

The Complaint further alleges that premiums on the policy were regularly paid to include the period from December 12, 1927 through January 12, 1934. This policy of insurance contained the following provision:

"This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Director of the United States Veterans Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy at the time of application for reinstatement of said policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy."

The Complaint further alleges that on February 28, 1934, Celeste Smith Murray paid a premium of $7.00, and that on March 4, 1934, she paid a further premium of $12.00 covering payment of premiums for a three months period of time. It is alleged that these sums of money were received by the respondent, and (R. 3) have since been retained.

The Complaint further alleges that at the time that the premium payment of $7.00 was made on February 28, 1934, and the further premium payment of $14.00 was paid on March 4th, 1934, the said insured Powhattan Powers Murray was in good health and an insurable risk, and was in every way entitled to the reinstatement of policy numbered K-852,467 under the terms and conditions of the said policy, the Acts of Congress relating thereto, and the regulations of the Veterans Administration lawfully promulgated in reference to the reinstatement of policies of insurance of like character (R. 3). The Complaint further alleges that in support of the contention that the insured was in good health there was duly furnished affidavits of a number of persons whose names are set forth in the paragraph, and the Complaint further alleges all affidavits and evidence furnished the United States

Veterans Administration showed the insured was in good health and an insurable risk on February 28, 1934, and March 4, 1934 (R. 4). It was further alleged that the reports of investigation made by the Veterans Administration showed the same fact as to the insured being an insurable risk on the dates in question, and that no evidence to the contrary has ever been or can be obtained.

The Complaint further alleges that notwithstanding the fact that all of the evidence contained in the insurance file of Powhattan Powers Murray showed without contradiction that he was in good health on February 28, 1934, and March 4, 1934, the said respondent acting in an arbitrary and a capricious manner, and contrary to all of the evidence in the file, refused to reinstate the policy of insurance, that the action was in total disregard of the terms of the policy, the Acts of Congress, and the regulations of the Veterans Administration.

The Complaint further alleges that the respondent was vested with a discretion in the matter of the reinstatement of the policy but that he was required to exercise a reasonable discretion and that he did not act in a reasonable manner or a *quasi-judicial* capacity but that in rendering a decision that the policy should not be reinstated totally disregarded the evidence and acted contrary thereto, and that the decision made that the policy was not entitled to be reinstated is not only contrary to all of the evidence but in conflict therewith, and that there is a total lack of evidence to support the decision, and that such decision is arbitrary, capricious and contrary both as to the fact, and law applicable (R. 5).

The Complaint further alleges that Powhattan Powers Murray died on March 5, 1934 (R. 5). Since the opinion of the United States Court of Appeals for the District of Columbia with some degree of sarcasm speculates upon the

cause of death it is stated for the information of the Court, although it would seem to be immaterial, that the insured was in good health until he died instantly from gunshot wounds on March 5, 1934.

The Complaint demands the respondent to be required to certify to the Court all of the evidence contained in the file of Powhattan Powers Murray in reference to the reinstatement of the policy at the time that the decision was rendered holding that the said policy could not be reinstated because of the physical and mental condition of the said insured on February 28, 1934, and March 4, 1934, to the District Court for a review. That upon a review and consideration of such evidence that the Court order and direct the respondent as Administrator of Veterans Affairs to perform his ministerial duty by reinstating the policy of insurance, and by further requiring him to apply the premiums paid on February 28, 1934, and March 4, 1934.

The Complaint further prays for such other and further relief as to the Court may appear to be proper and just (R. 6).

The respondent filed an answer to the Complaint (R. 7, 8, 9, 10, 11, 12, 13, 14, 15).

The judgment is however predicated upon the motion to dismiss (R. 16) upon the grounds that the complaint fails to state a cause of action upon which relief may be granted. Judgment is based on the motion to dismiss which was granted (R. 16).

Specifications to Errors To Be Urged.

That the District Court of the United States for the District of Columbia, erred in sustaining the motion to dismiss the complaint, and that the United States Court of Appeals for the District of Columbia erred in affirming the judgment.

Reasons for Granting the Writ.

The petitioner asserts that a writ of certiorari should be granted under subdivision (5) of Rule 38 of this Court in that the United States Court of Appeals has decided a most important question of law in conflict with the decision of other United States Circuit Court of Appeals, and the applicable decisions of this Honorable Court, to which reference will be made in the cases cited in the Argument and Brief of the petitioner.

This case is not only of the utmost importance to policyholders whose policies were issued to persons who were insured under the original War Risk Insurance Act, and its amendments, and the World War Veterans Act, 1924, and its amendments, but also to persons who have been since October 1940 insured under the National Service Life Insurance Act. There has been over a $100,000,000,000. worth of insurance issued under these acts, and the question of whether the Administrator of Veterans Affairs can act arbitrary, capricious and contrary to the evidence in the matter of the reinstatement of these policies is of utmost importance to millions of policyholders. The motion to dismiss admits that the respondent did so act. No case has ever been considered by the Court of greater importance to such a number of persons, or so involves rights of policyholders. If the respondent in the matter of acting on the reinstatement of insurance policies can totally disregard evidence, and base a contrary decision on no evidence of any character the policyholders are now entitled to know it, and ask for their remedy by amendment to the various laws in order to be protected against the unjust decisions based on no evidence of arbitrary officials of the government.

It is the contention of the petitioner that under the undisputed facts it was the duty of the respondent to re-

instate the policy of insurance in question. It was the duty of the respondent to act purely in a ministerial capacity in this case. The evidence showing that the insured was in good health was undisputed. There was a sufficient amount of premiums paid to reinstate the policy. Under these undisputed facts, the respondent had but one duty to perform and that was a ministerial one of reinstating the policy. The decision of the District Court of the United States for the District of Columbia and the decision of the United States Court of Appeals for the District of Columbia conflicts with the decisions of this Court holding that mandamus will lie to compel officials to perform a purely ministerial duty. In the case of *Wilber v. U. S. ex rel. Kadrie, et al.*, 281 U. S. 206-222, 74 L. Ed. 809, this Court held that where an officer's duty is plainly prescribed, performance thereof may be compelled by mandamus. Under the undisputed facts in this case, the respondent had no discretion save and except to reinstate the policy of insurance. The complaint alleges and the Motion to Dismiss admits that there is no evidence to support the decision that the insured was not in good health on the date that the premiums were tendered, and the only requirements were that he be in good health on that date. The decision of the United States Court of Appeals for the District of Columbia also conflicts with the decisions of its own making in the case of *Hines v. U. S.*, 105 Fed. 2nd 85; the Court below held that an administrative official could be compelled to perform a ministerial act. Also, the decision conflicts with the view point and the general rule laid down by the 7th United States Circuit Court of Appeals in the case of *Cowan et al. v. Dickinson Industrial Site et al.*, 104 F. 2d 771, held that the discretion of a trial Court should not be disturbed unless abused; that the discretion was a judicial one and did not extend to arbitrary and unreasonable action.

This Court early held that the Courts may compel an executive officer to perform a mere ministerial act, *U. S. v. Schurz*, 102 U. S. 378, 26 L. Ed. 167. This is not the ordinary case where an administrative official exercises a discretion in the matter of performing a ministerial act, or rendering a decision upon the facts before him. The complaint alleges, and the Motion to Dismiss admits, that there was no evidence before the respondent upon which to predicate a decision that the insured was not in good health, which was the only basis for the denial of the application for reinstatement of the policy in question.

The United States Court of Appeals for the District of Columbia overlooked its own decisions in deciding this case. In the case of *U. S. ex rel. Thomson v. Custis*, 35 App. D. C. 247, the Court below held that while the Board of Medical Examiners of the District of Columbia had a reasonable discretion in admitting to practice physicians who have qualified in outside jurisdictions, that they could not arbitrarily or capriciously deny an application for a license to practice medicine when the law and the facts showed that the applicant was entitled to receive his license. It is this line of decisions upon which the petitioner relies, —that where the undisputed facts and law applicable thereto show that the petitioner, as a matter of right, is entitled to the performance of a ministerial act, the administrative official will be compelled to perform that act.

The decision of the United States Court of Appeals for the District of Columbia departs from this theory of law and holds in effect that in acting on the reinstatement of the policy of insurance the respondent may act arbitrary, capricious and contrary to fact and law, and that the Courts have no authority to control his action. It is for this reason that this Court, in the exercise of its supervision, should assume jurisdiction in this case and hear and determine

the questions of law which are of such vital importance to millions of policyholders who have been issued government insurance.

Conclusion.

Wherefore, petitioner prays that a Writ of Certiorari may issue under the seal of this honorable court in this cause, directed to the United States Court of Appeals for the District of Columbia and that upon a review, the judgment of the United States Court of Appeals for the District of Columbia be vacated and reversed and set aside and that this cause be remanded to that Court with instructions to proceed further in accordance with the views of this Court.

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ARGUMENT AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The United States Court of Appeals for the District of Columbia held that allegations of the complaint were not sufficient to show that the plaintiff was entitled to reinstatement of the policy in question.

The motion to dismiss the complaint admits all of the material facts pleaded in the complaint.

Kithcart v. Metropolitan Life Insurance Company, 88 F. 2d. 407.

Winget v. Rockwood, *et al.,* 69 F. 2d. 326.

Henderson v. Binkley Coal Co., 74 F. 2d. 567.

District of Columbia v. Selden, 68 F. 2d. 988.

Work v. U. S. *ex rel.* Rives, 267 U. S. 175, 69 L. Ed. 561.

It admits for the purpose of this petition the fact that the Administrator of Veterans Affairs was charged by law

with the reinstatement of lapsed insurance policies, and that there is no evidence to sustain the decision that the policy was not entitled to reinstatement, and that all of the evidence showed that the insured was in good health as of February 28, 1934, and March 4, 1934, when the premiums were paid.

The policy contained the following provision as to the reinstatement of the policy (R. 2):

> "This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Director of the United States Veterans Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy."

It is to be noted that if the policy has not been surrendered for a cash surrender value the Director of the United States Veterans Bureau (now the respondent in this action) has the right to reinstate the policy upon payment of premiums and evidence that the insured is an insurable risk.

The regulation upon which the question of the reinstatement of the insurance policy is predicated is set forth in the opinion of the Court below, and is as follows:

> "3079. United States Government life insurance may be reinstated:
> "(A) Within three calendar months including the calendar month for which the unpaid premium was due, provided the applicant is in as good health as he was at the due date of the premium in default.
> "3080. The applicant for reinstatement of United States Government life insurance must furnish during his lifetime, and before becoming totally and perma-

nently disabled, a written application signed by him which shall state that he is in as good health as at date of lapse, or that he is in good health, in accordance with the requirements of the particular case; and in addition the applicant shall furnish such evidence relative to his physical condition as may be required by the director on such forms as the director may prescribe: PROVIDED, That if the insurance becomes a claim after tender of the amount of the premiums required but before full compliance with the requirements of this paragraph, and the applicant was in the required state of health at the date that he made the tender of the amount of premiums, and that there is a satisfactory reason for his noncompliance, the director may, if the applicant be dead, waive any or all of the requirements of this paragraph, or if the applicant be living, allow compliance with this paragraph, as of the date the required amount of premiums was received in the bureau."

There is a difference between the regulation and the policy. The provisions of the policy requires only the payment of all premiums "which are in arrears" and the furnishing of evidence of insurability. The regulation makes an additional requirement that "there is a satisfactory reason for his non-compliance."

This requirement imposes a condition not required under the terms of the policy. In fact, the language is so loose that no one could comply with its conditions, as the regulation does not set forth what is required as a "satisfactory reason". The regulation writes into the insurance policy an extra condition, a requirement for reinstatement. As a matter of actual practice the regulation requiring a satisfactory reason for non-compliance has never been enforced by the Veterans Administration.

The answer filed by the respondent in this case justifies the refusal of the respondent to reinstate the policy upon the grounds that the insured was not in good health (R. 12). It is no where alleged that the no satisfactory excuse was presented.

The Court below overlooked the fact that the complaint alleges (R. 3) that at the time the premium payment of $7.00 was paid on February 28, 1934, and the further premium payment of $14.00 was made on March 4, 1934, the said Powhattan Powers Murray was then in good health and an insurable risk and was entitled to a reinstatement of the Policy No. K-852,467 under the terms of said policy and under the acts of Congress relating thereto.

Under the policy only two requirements were necessary: first, the payment of the premiums in arrears; and second, proof that at the time that the premiums were tendered the insured was in good health.

Both of these conditions were complied with. All premiums in arrears were paid under the policy.

The law appears to be well settled that in acting on a reinstatement of a policy the insurer cannot impose conditions other than those required by the policy. The respondent could not require more than proof that the insured was in good health when the premiums were tendered and that the requisite amount of the premiums were in fact tendered. As stated above, the law here seems to be well settled, that no conditions other than those were required by the policy are to be imposed.

45 Corpus Juris, 121, citing:

Old Colony Life Insurance Company v. Graves, 200 Ill. A 71.

Arrison v. Supreme Council, 129 W. W. A. 303, 105 N. W. 508.

Colley v. Wilson, 86 MO A 396.

Loundsbury v. Maccabees, V. M. 128 App. Div. 394, 112 N. Y. S. App. 921, Aff. 199 N. Y. 573.

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Texas Supreme Lodge N. R. A. v. Turner, 19 Texas Civ. A 346, 47 Southwestern 44.

There are no statutory provisions under any of the acts administered by the Veterans Administration relating to the granting or reinstating of government life insurance such as here is sued upon, as require a satisfactory reason for the failure to pay premiums on the due date.

It is the contention of the petitioner that under the undisputed facts and the law applicable, the respondent had only a ministerial duty to perform—the matter of reinstating the policy in question. The petitioner was entitled to reinstatement of the policy because under the terms of the policy the policy was entitled to be reinstated at a time when the insured was in good health and by the payment of the requisite payments. It is conceded that the premium payments made were sufficient to pay all premiums in arrears as is required under the terms of the policy.

The petitioner concedes that if the insured had not in truth and fact been in good health and there had been any evidence of that character presented to the respondent that the respondent would have been vested with the discretion in the matter of the reinstatement of the policy. But that is not the fact in this case. The complaint alleges and the Motion to Dismiss admits that all of the evidence before the respondent with reference to the reinstatement of the policy in question showed that the insured at the time of the payment of the premiums was in good health. In view of the fact that every compliance was made with the requirement as to reinstatement and there is no evidence that the insured was not in good health, the duty of the respondent became a purely ministerial one. This Court in considering this case is not dealing with a case where an administrative officer had evidence upon which he could have exercised his discretion. If it were such a case, the petitioner admits that there is no basis for a suit in the nature of a mandamus. The case is simply one in which the respondent ignores the evidence as to the good health of the insured

and has simply refused to perform his ministerial duty in the matter of the reinstatement of the policy. The case is predicated upon those decisions which hold that an administrative officer may have a discretion where there is conflicting evidence, but where the evidence shows that only a reasonable man could reach one conclusion in the matter, the action is not one of discretion but rather of a ministerial duty on the part of the administrative officer. This rule has long since been recognized by the Courts. This Court in the case of *Wilber v. U. S., ex rel. Kadrie, et al.*, 281 U. S. 206-222, 74 L. Ed. 809, held that a mandamus would lie to compel an officer to perform a ministerial duty. This followed the decisions herein made by this Court in the case of *U. S. v. Schurz*, 102 U. S. 378; 26 L. Ed. 167.

The respondent had purely a ministerial duty to perform in this case. The United States Court of Appeals below held that under the regulations the word "may" in reference to the reinstatement would have to be construed as "must" in order to enable petitioner to prevail in this case.

The law has long been settled by repeated decisions of this Court that the word "may" in a statute must be construed as "must" where the legislature means to impose a positive and absolute duty upon an administrator. *Minor v. Mechanic's Bank*, 1 Pet. 46-88, 7 L. Ed. 47; *Supervisors v. United States*, 4 Wall. 446, 18 L. Ed. 419. In the case of Supervisors v. U. S., *supra*, this honorable Court said that "where a power is given to public officers whenever the public interest or individual rights call for its exercise the language used although permissive in form is in fact peremptory. In all such cases, it is held that the intent of the legislature was not to devolve a mere discretion but to impose a positive and absolute duty." The case of Supervisors v. U. S. *supra* was cited with approval in the case of *U. S. v. Steamboat Co.*, 202 U. S. 192, 50 L. Ed. 991, and it was held in that opinion that the Secretary of the

Treasury could not arbitrarily refuse to allow refunds of duties provided for in the statute although it might involve some discretion upon his part. This Court also held in the case of *U. S. v. Silberschein*, 266 U. S. 221, 45 Sup. Ct. 69, that while, as a general rule, the Courts had no authority to entertain suits in compensation payments under the provisions of the War Risk Insurance Act, and that the decision of the Director of the Veterans Bureau could not be reviewed in the ordinary case, that a review might be had where such decision was arbitrary, capricious or contrary to law. While Congress by the Economy Act of March 20, 1933 made the decision of the Director of the Bureau final and conclusive and not subject to Court review, the case of U. S. v. Silberschein *supra* is cited for the reason that this Court held that even in compensation matters a review might be had where the decision was capricious, arbitrary and contrary to law. In this case we are not dealing with the matter of a gratuity; we are concerned with contractual rights under a policy of insurance in which the respondent has acted arbitrarily, capriciously and contrary to the law.

Even though the respondent was vested with a discretion in the matter of the reinstatement of the insurance, the Courts unanimously hold that such a discretion in relation to other matters must be reasonable and not arbitrary, unlimited or absolute discretion.

The 7th Circuit Court of Appeals in the case of *U. S. National Bank v. Sullivan*, 69 Fed. 2nd 412, 415, 7th CCA, said that the discretion of a trustee must be reasonable not arbitrary, unlimited or absolute discretion. It is the same type of a discretion with which the trial court is vested. The discretion does not extend to arbitrary and unreasonable acts. *In re Dickinson Co.*, 104 Fed. (2) 771, 775, 7th CCA, the discretion is abused when the judicial

action is arbitrary fanciful or unreasonable, *Delno v. Market Street Railway*, 124 Fed. (2) 965, 9th CCA.

The United States Court of Appeals below has held to the same effect. *U. S. v. Custis*, 35 App. D. C. 247. It was held in that case that the Board of Medical Examiners had a reasonable discretion in admitting to practice physicians who qualified in an outside jurisdiction, but that they could not arbitrarily or capriciously deny an application for a license to practice medicine when the law and the facts showed that the applicant was entitled to receive his license.

Despite the decision of the United States Court of Appeals below in this case, that Court had already held that the respondent could be required to reinstate a policy of insurance. It so held in the case of *U. S. ex rel. Lyons v. Hines*, 103 Fed. (2nd) 373; 70 App. D. C. 36. The decision in this case clearly conflicts with their ruling in the case of U. S. *ex rel.* Lyons v. Hines, *supra*. The two decisions cannot be reconciled.

The Court below has also held that the respondent could be required to perform his ministerial duties and so held in the case of *U. S. v. Hines*, 105 Fed. 2nd 85, 70 App. D. C. 206.

Citing not a single decision to justify its unusual, and without precedent, opinion in this case, the Court below concludes that the respondent has an absolute and dictatorial discretion in the matter of reinstatement of government insurance policies. This question is of vital importance to millions of policyholders of the government. The Court below laid down the rule that no matter if all of the evidence showed that the insured was in good health and that the premiums were paid, the respondent had no duty of carrying out the terms of the policy to reinstate the insurance contract. This ruling is contrary, as far as

is known, to all precedents and this Court, in the exercise of its supervisory powers should take jurisdiction in this case because of the importance of the decision to the great number of policyholders holding government insurance contracts. Unless the respondent can be compelled to reinstate this policy of insurance the petitioner is without remedy. Meadows v. U. S., 281 U. S. 271, 74 L. Ed. 852.

The petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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061420—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 220

DAISY I. MORGAN, EXECUTRIX OF THE ESTATE OF CELESTE SMITH MURRAY, DECEASED, PETITIONER

v.

FRANK T. HINES, AS ADMINISTRATOR OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court did not deliver an opinion. The opinion of the Court of Appeals for the District of Columbia (R. 19–20) is reported in 149 F. (2d) 21.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1945 (R. 21). The petition for a writ of certiorari was filed on July 12, 1945. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

An administrative regulation regarding reinstatement of United States Government life insurance required the insured to furnish a written application signed by him, and provided as a condition to waiving this requirement after his death that there be a "satisfactory reason" for his noncompliance. This case presents the question whether in the absence of compliance with the requirement and of any reason for noncompliance other than the insured's death, the personal representative of the beneficiary was properly denied mandatory relief compelling the Administrator of Veterans Affairs to reinstate the policy.

POLICY PROVISION AND REGULATION INVOLVED

The insurance policy involved contained the following provision as to reinstatement (R. 2–3):

> This policy, if it has not been surrendered for a cash value, may be reinstated at any time after lapse upon evidence of the insurability of the Insured satisfactory to the Director of the United States Veterans Bureau, and upon the payment of all premiums in arrears, with interest from their several due dates at the rate of five per centum per annum, and the payment or reinstatement of any indebtedness which existed at the time of such default, with

policy loan interest. However, if such indebtedness with interest would exceed the reserve of this policy at the time of application for reinstatement of said policy, then the amount of such excess shall be paid by the Insured as a condition of the reinstatement of indebtedness and of this policy.

The pertinent regulations of the Veterans Administration as to reinstatement provide:

3079. United States Government life insurance may be reinstated:

(A) Within three calendar months including the calendar month for which the unpaid premium was due, provided the applicant is in as good health as he was at the due date of the premium in default. (38 C. F. R. 10.3079.)

* * * * *

3080. The applicant for reinstatement of United States Government life insurance must furnish during his lifetime, and before becoming totally and permanently disabled, a written application signed by him which shall state that he is in as good health as at date of lapse, or that he is in good health, in accordance with the requirements of the particular case; and in addition the applicant shall furnish such evidence relative to his physical condition as may be required by the director on such forms as the director may prescribe: *Provided,* That if the insurance becomes a claim after tender

of the amount of the premiums required but before full compliance with the requirements of this paragraph, and the applicant was in the required state of health at the date that he made the tender of the amount of premiums, and that there is a satisfactory reason for his noncompliance, the director may, if the applicant be dead, waive any or all of the requirements of this paragraph, or, if the applicant be living, allow compliance with this paragraph, as of the date the required amount of premiums was received in the bureau. (38 C. F. R. 10.3080.)

STATEMENT

This suit was brought on August 4, 1943, by the petitioner Daisy I. Morgan as "Executrix" of the estate of Celeste Smith Murray, the deceased beneficiary of a lapsed $10,000 United States Government life insurance policy, to compel the respondent, the Administrator of Veterans Affairs to reinstate the policy as of a date prior to the death of the insured (R. 1–6).

The petitioner's complaint alleged in effect that the policy lapsed for nonpayment of the monthly premium due on January 12, 1934, and that the insured died on March 5, 1934; that the beneficiary, who had previously paid all the premiums on the policy, "paid" as premiums on two occasions within a week prior to the insured's death sums of money the total amount of which was

more than sufficient to reinstate the policy, the last payment being made on the day before his death; and that when each of these payments was made the insured was in good health and an insurable risk (R. 2–4).

The complaint further alleged that the respondent arbitrarily refused to reinstate the policy because of the physical and mental condition of the insured when the two payments were made, despite the fact that all of the evidence in the insured's file—it was alleged on information and belief—showed that the insured was in good health on those occasions (R. 4–5).

The respondent filed an answer (R. 7–15) denying the allegations in the complaint as to the insured's health, what the evidence in the file showed concerning it, and the allegations that the respondent's refusal to reinstate was arbitrary (Paragraphs III, V, and VIII; R. 10, 11). The answer alleged in effect that the insured failed to comply with the requirement in Regulation 3080 *supra,* pp. 3–4, that he furnish an application signed by him containing a statement that he was in the required state of health; that the beneficiary had sought a waiver of the requirement under the proviso for waiver in the Regulation and that respondent had refused to waive the requirement and reinstate the policy because he found upon all of the evidence in the record that insured was not in the required state of health (Paragraph IX; R. 13, 14).

The answer denied the allegations in the complaint as to the respective dates of the two payments made by the beneficiary and of the insured's death, alleging that the insured died on March 4, and not on March 5 (as alleged in the complaint); that the check for the first payment was "tendered" by the beneficiary on the day before the insured's death, and the second check not until the day after death (Par. II; R. 9–10, Par. VII; R. 11, Par. IX; R. 12–13).[1] It was further alleged that an offer had been made to the beneficiary to refund the money upon a proper showing as to who was entitled to it, but that there had been no response to the offer (Pars. II & IX; R. 10, 13).

Thereafter the action was dismissed on motion filed by respondent for failure of the complaint to state a cause of action (R. 16). On appeal by petitioner (R. 17), the Court of Appeals for the

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[1] According to these allegations in the answer there was a failure to comply with the condition in the waiver proviso in Regulation 3080 that a "tender of the amount of the premiums required" be made before "the insurance becomes a claim," *i. e.*, before the insured's death. The policy required payment of "all premiums in arrears" when the insured died. These included not only the one due on January 12 (the date of the lapse), but also the one due February 12, despite the fact that the grace period for its payment had not expired. *United States* v. *Huie*, 73 F. (2d) 305, 306 (C. C. A. 5); *United States* v. *Norton*, 77 F. (2d) 731 (C. C. A. 5). The amount ($7.00) of the only payment made before death according to these allegations was only sufficient to pay one monthly premium.

District of Columbia affirmed, holding that the complaint failed to show any duty or, indeed, any power in the respondent to waive the requirement for reinstatement in Regulation 3080[2] (*supra*, pp. 3–4), which admittedly had not been complied with, as to furnishing a written application signed by the insured containing a statement that he was in the required state of health. The court interpreted the proviso in the regulation for waiver of the requirements of the regulation after an insured's death, as not permitting such a waiver in the absence of a "satisfactory reason" (Regulation 3080) for the insured's noncompliance with the requirements, and held that no such reason appeared from the complaint.

ARGUMENT

The decisions of the courts below are in accord with the rule established by numerous decisions of this Court, the Court of Appeals for the District of Columbia, and other federal appellate courts, that an action, as here, in the nature of mandamus does not lie against an executive officer

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[2] This regulation was authorized by Section 5 of the Act of June 7, 1924, 43 Stat. 607, 608, 38 U. S. C. 426, which provides in part:

"The director [Administrator of Veterans Affairs], subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, * * *."

unless the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory. *United States* v. *Wilbur*, 283 U. S. 414, 420; *United States ex rel Girard Co.* v. *Helvering*, 301 U. S. 540, 543; *United States* v. *Coe*, 95 F. (2d) 347, 348 (App. D. C.); *Hammond* v. *Hull*, 131 F. (2d) 23, 25 (App. D. C.); *Huddleston* v. *Dwyer*, 145 F. (2d) 311, 315 (C. C. A. 10); *Frankel* v. *Woodrough*, 7 F. (2d) 796, 797 (C. C. A. 8). Regulation 3080, *supra*, pp. 3–4, contains a proviso that the director [Administrator of Veterans Affairs] "*may* * * * waive" certain reinstatement requirements if three conditions are met, *viz.*, (1) tender of premiums in arrears, (2) good health of the insured at the time of tender, and (3) "satisfactory reason" for not filing a written application, etc., concerning his health. Because of its terminology, this proviso lodges a large degree of discretion in the Administrator (cf. Pet. 15–16), thereby rendering untenable an action in the nature of mandamus. In any event, petitioner did not meet the third "satisfactory reason" condition.

In the complaint there was no allegation of compliance with the requirement in Regulation 3080, *supra*, pp. 3–4, that the insured furnish a written application for reinstatement signed by him. Petitioner apparently concedes, as in the court below, that there was no such compliance. Consequently, under the proviso clause of the regulation, a "satisfactory reason" for noncompli-

ance with the requirement is called for. Death is the only reason appearing in the complaint, but, as the court below observed (R. 20), death would not constitute a "satisfactory reason" for noncompliance. The proviso "and that there is a satisfactory reason for his noncompliance" applies only where the insured has died and would be surplusage if death alone were a sufficient reason. The phrase was obviously inserted to protect the Government from fraudulent claims, such as where the insured has not consented to reinstatement.

Petitioner asserts, without attempting to support the assertion, that the "satisfactory reason" part of Regulation 3080 "has never been enforced by the Veterans Administration" (Pet. 13). On the contrary, the Veterans Administration has consistently insisted that a "satisfactory reason" be shown for noncompliance. Petitioner's case is not supported by the fact that respondent in his answer [3] defended on the ground that the insured was not in the required state of health and did not allege the absence of a "satisfactory reason" for the insured's failure to furnish a statement signed by him that he was in the required state of health (see Pet. 13). Such an omission from the

[3] In the answer, the respondent stated that the tender of premiums in arrears was not acceptable since unaccompanied by the insured's written application concerning health and that the "other requirements of said Regulation [3080] should not be waived" (R. 13, 14).

answer may not be regarded as favorable to petitioner, since the matter to which it relates was an essential part of her own case.

The deficiency in the complaint of a lack of any allegation of the "satisfactory reason" prerequisite to waiver in question was manifestly not supplied by the allegation of another prerequisite (*i. e.*, that the insured "was in the required state of health at the date that he made the tender of the amount of the premiums"), or by the allegation that respondent's refusal to reinstate was based on an erroneous and arbitrary finding as to the insured's health. None of the decisions regarding mandatory relief, relied on by petitioner (Pet. 8, 9, 16–18) is in conflict with this view.

CONCLUSION

The decision of the court below is correct and presents no conflict. We therefore respectfully submit that the petition should be denied.

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